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Issue Date: 06 November 2003

Case No.: 1997-LHC-2495

OWCP No.: 5-88809

In the Matter of

JAMES W. BROWN,
Claimant

v.

NEWPORT NEWS SHIPBUILDING & DRY DOCK COMPANY,
Employer

Appearances:

John H. Klein, Esq., for Claimant
Benjamin M. Mason, Esq., for Employer

Before:

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION ON REMAND

This proceeding involves a claim for compensation by the Claimant, James W. Brown, covered by the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (hereinafter referred to as the "Act").

The claim was referred by the Director, Office of Workers' Compensation Programs to the Office of Administrative Law Judges for a formal hearing in accordance with the Act and the regulations issued thereunder. A formal hearing was held on August 11, 1998, in Newport News, Virginia. (Tr. at 1).¹ A decision and order was issued on November 10, 1999, finding that Employer had failed to establish suitable alternate employment.

By a decision and order dated December 5, 2000, ("First Remand"), the Benefits Review Board ("BRB" or "Board") vacated and remanded this matter for further consideration of whether the positions of security guard and cashier were suitable alternate employment consistent with its decision. An order was issued on February 21, 2001, permitting the parties to

¹ The following abbreviations will be used to refer to the parties' exhibits: "CX" shall denote Claimant's exhibits; "EX" shall denote Employer's exhibits. "Tr." shall denote the transcript.

submit motions, and requiring submission of briefs and proposed findings on remand. Claimant submitted a brief prior to the entry of the February 21, 2001, order, and declined to submit another brief after the record was re-opened. Claimant submitted a Statement of Proposed Findings on March 26, 2001. Employer submitted a brief on March 23, 2001, in accordance with the February 21, 2001, order. In its brief, Employer moved for the admittance of substituted pages (k) through (p) of Employer's Exhibit 11, which were submitted on September 9, 1998, and September 15, 1998, and contained evidence that Dr. Samuel Kline, Employer's physician, approved the positions found by Employer's vocational consultant to be suitable alternate employment. These pages were submitted post-hearing, and the record had not been held open to receive additional evidence. Claimant did not dispute that Dr. Kline approved the positions, and the post-hearing evidence was admitted.

A Decision on Remand was issued on August 8, 2001, finding again that Employer had failed to establish suitable alternate employment as the security guard positions and the cashier position. The Decision on Remand further found that Claimant was entitled to permanent total disability from May 12, 1997, at a compensation rate of \$365.97 per week.

By a decision and order dated August 22, 2002, ("Second Remand"), the BRB affirmed the finding that the cashier position was not suitable alternate employment. The BRB vacated and reversed the finding that the security guard positions at Diversified Industrial Concepts and the Virginia Department of Transportation were not suitable alternate employment, substituting its own finding of fact that the security guard positions were suitable alternate employment. The BRB remanded this matter for further consideration of when suitable alternate employment became available and whether claimant established diligence in seeking suitable alternate employment "of the general type shown by employer to be suitable and available," consistent with its decision. Additionally, the Board found that Claimant is entitled to total disability benefits until the date suitable alternate employment became available.

An order was issued on September 9, 2002, requiring submission of briefs within thirty days of that date. By order issued October 29, 2002, an extension of time for submitting briefs was granted, permitting the parties until November 8, 2002, to submit briefs. Claimant submitted his Brief on Remand on October 15, 2002. Employer submitted its Brief on Remand on October 30, 2002.

ISSUES

The issues presented on remand are:

1. When suitable alternate employment, *i.e.*, the security guard positions at Diversified Industrial Concepts and the Virginia Department of Transportation, became available.
2. Whether Claimant established that he diligently sought alternate employment of the general type shown by Employer to be suitable and available.

STIPULATIONS

At the August 11, 1998, hearing, Claimant and Employer stipulated on the record that:

1. The parties are subject to the jurisdiction of the Act;
2. An employer/employee relationship existed at all relevant times;
3. Claimant suffered an injury arising out of and in the course of his employment on May 11, 1993;
4. A timely notice of controversion, and a timely first report of the accident were filed by Employer;
5. Employer has provided medical services in accordance with the Act;
6. Employer has paid compensation voluntarily as set forth in Employer's Exhibit 12; and
7. Claimant's average weekly wage at the time of his injury was \$548.95, which results in a compensation rate of \$365.97 per week.

(Tr. at 6-7). These stipulations were admitted into evidence and therefore bind Claimant and Employer pursuant to 29 C.F.R. § 18.51 (2003). See *Duncan v. Washington Metro. Area Transit Auth.*, 24 BRBS 133, 135 n.2 (1990) (per curiam) *Warren v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 149, 151-52 (1988) (per curiam).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Initially, the Board's decision to substitute its own fact-finding as to whether Employer established suitable alternate employment must be addressed. While I accept, for the purpose of this decision, the BRB's reversal in the Second Remand, I respectfully disagree with the Board that Employer established suitable alternate employment, and continue to maintain that Employer was not successful in carrying its burden of proving suitable alternate employment with regard to the security guard positions for the reasons set forth in the August 8, 2001, decision. Nevertheless, for the purpose of complying with the Board's decision, its finding of fact will be applied to this decision on remand.

The finding in the original decision and the decision on remand that Employer failed to establish suitable alternate employment was, I believe, rational, supported by substantial evidence, and in accordance with the law. David Karmolinski, a vocational consultant retained by Employer, identified the positions of Security Guard, *Dictionary of Occupational Titles* (DOT) code 189.167-034, and Cashier, DOT code 211.462-014, as suitable alternate employment. I found on remand that the cashier position was not suitable alternate employment for Claimant because of the restriction against manipulating small objects with his right hand

imposed by Dr. Samuel Kline and Dr. Timothy Lee (Claimant's physician). The Board affirmed the portion of the decision on remand as to the cashier positions.

I further found on remand that the position of security guard was not suitable alternate employment. The Board intimates that, instead of examining the job duties described in the *Dictionary of Occupational Titles*, the actual job duties should be the focus of determining whether a particular job or category of jobs constitute suitable alternate employment. Despite Dr. Kline's approval, the evidence presented was unclear as to whether the information provided to him was sufficiently accurate to allow him to make an informed decision as to the suitability of the positions. The duties of the cashier positions, which I found were not suitable alternate employment, require repetitive manipulation of small objects with both hands. These duties are directly contrary to the restrictions placed upon Claimant by both Drs. Kline and Lee and calls into question whether Dr. Kline actually examined the required job duties of any of the positions Mr. Karmolinski asked Dr. Kline to approve.

Further, it appeared that Mr. Karmolinski's reasoning in the labor market survey and the survey's outcome was flawed. The DOT description upon which Mr. Karmolinski based his opinion states that a cashier would be required to count money, which would require manipulation of small objects such as coins with the hands; these duties were also included in the specific job descriptions identified by Mr. Karmolinski. This obvious inconsistency calls into question whether Mr. Karmolinski accurately utilized the job descriptions in the DOT and those provided for the actual jobs he submitted in light of Claimant's physical restrictions.

The employer bears the burden of proof to establish suitable alternate employment. In light of the confusion that abounds in Mr. Karmolinski's report and Dr. Kline's approval of the positions identified by Mr. Karmolinski, I assigned little weight to their opinions. Without further evidence as to the accuracy of Mr. Karmolinski's and Dr. Kline's assessments, I therefore found, and continue to maintain, that Employer did not bear its burden of proof because its evidence was not credible; thus, I found that the security guard positions do not constitute suitable alternate employment. However, as stated above, I will apply the Board's finding of fact that the positions do constitute suitable alternate employment for the purpose of complying with the BRB's decision.

On What Date Did Suitable Alternate Employment Become Available?

The Board has found that Employer established suitable alternate employment through the security guard positions at Diversified Industrial Concepts and the Virginia Department of Transportation. The Board has directed that this decision on remand address the date on which suitable alternate employment became available to Claimant for purposes of establishing the disability compensation to which Claimant is entitled.

The date on which suitable alternate employment became available is that date upon which Claimant could have realistically secured employment that he is capable of performing, considering his age, education, work experience, and physical restrictions, had he made a diligent effort. *Trans-State Dredging v. Benefits Review Bd.*, 731 F.2d 199, 201 (4th Cir. 1984) (quoting *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43 (5th Cir. 1981)).

The employer carries the burden of showing the reasonable availability of specific jobs within the job market at critical times. *Universal Mar. Corp. v. Moore*, 126 F.3d 256, 265 (4th Cir. 1997); *Turner*, 661 F.2d at 1043. The Fourth Circuit has held that the term “critical times” will not be restricted to that period immediately before the administrative hearing as held. *Trans-State Dredging*, 731 F.3d at 202. The court has also refused to restrict “critical time” to mean that period during which the labor market survey is conducted. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 542-43 (4th Cir. 1988). Instead, the court has interpreted critical time to mean the time “during which the claimant was able to seek work.” *Id.* at 543.

The earliest date on which suitable alternate employment becomes available determines the date on which the extent of a claimant’s disability changes, economically and medically speaking, from total to partial disability. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 130-31 (1991) (per curiam) (citing *Director, OWCP v. Berkstresser*, 921 F.2d 306, 312 (D.C. Cir. 1990)). The definition of “disability” (Section 2(10) of the Act) “supports using the date of suitable alternate employment as the indicator for when total disability becomes partial,” because “the incapacity to earn wages . . . is dependent upon a showing of suitable alternate employment.” *Rinaldi*, 25 BRBS at 130 (citing *Stevens v. Director, OWCP*, 909 F.2d 1256, 1259-60 (9th Cir. 1990)); see also *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 592 F.2d 762, 765 (4th Cir. 1979) (reasoning that disability is an economic as well as physical concept). The “date of maximum medical improvement has ‘no direct relevance’ as to whether a disability is total or partial.” *Rinaldi*, 25 BRBS at 130 (quoting *Palombo v. Director, OWCP*, 937 F.2d 70, 76 (2d Cir. 1991)).

Employer asserts that suitable alternate employment, namely the security guard positions, was available to Claimant on July 14, 1997, and has been “regularly available” on and after that date. (Empl. Br. on Rem., at 3; Tr. at 75).² Dr. Kline placed Claimant under permanent work restrictions as to his right upper extremity on May 12, 1997. (EX-2, at (vv)). Based upon these restrictions, Mr. Karmolinski determined that two security guard positions and positions similar to those have been regularly available since July 14, 1997. It was as of this date that Employer ceased paying temporary total disability. (EX-12, at 1).

At the hearing, Mr. Karmolinski testified that he spoke with Ms. Barbara Hooper, director of professional services at Diversified Industrial Concepts, on approximately August 5, 1998. At that time, Ms. Hooper informed him that she hired individuals for the security guard position approximately fifteen times per year and that she was planning on hiring “in a couple of weeks” for the security guard position at the Norfolk Naval Base. (Tr. at 49-52).

Mr. Karmolinski further testified that he also spoke with Lieutenant Patrick Rumble of Clemons Security, the hiring agency for the security guard position with the Virginia Department of Transportation (VDOT) in Suffolk, Virginia. (Tr. at 53). Mr. Karmolinski testified that the VDOT security guard position was available “at least twice per year that I know of.” (Tr. at 55). Similar to his conversation with Ms. Hooper, Mr. Karmolinski testified that Lieutenant Rumble

² References to “Brief on Remand” or “Br. on Rem.” will refer to either Claimant’s or Employer’s brief submitted pursuant to the order issued by this office on September 9, 2002, requesting the submission of briefs after the Board’s second remand, unless otherwise specified.

told him “to contact him again in a couple of weeks, so I think he anticipates an opening.” (Tr. at 55).

Claimant contends that suitable alternate employment was not available until, at the earliest, August 3, 1998, the date of the labor market survey. (Claim. Br. on Rem., at 3; EX-11, at (a)). Claimant further argues that the jobs identified by Employer in the labor market survey were not available to Claimant until the time of the hearing because Claimant was not provided with a copy of the survey until the hearing. (Claim. Br. on Rem., at 9).

Claimant alternatively argues that the more appropriate date of availability of suitable alternate employment was either September 9, 1998, or September 15, 1998, the dates when Dr. Kline approved the job descriptions. (Claim. Br. on Rem., at 3, 9-10). Claimant asserts that, because Dr. Kline failed to approve the positions until after the hearing, “it was impossible to tell [Claimant] that the jobs cited in the labor market survey were actually suitable.” (Claim. Br. on Rem., at 9).

The date on which Dr. Kline formally approved the security guard positions is not readily apparent from an examination of Employer’s exhibits. Employer’s Exhibit 11 contains pages (k) and (l), which were received by this office on September 11, 1998, with a cover letter from Employer’s counsel dated September 9, 1998; this portion of Employer’s Exhibit 11 was not formally admitted until the first Decision on Remand. Counsel for Employer indicated in his cover letter that, as of the hearing date (August 11, 1998), Mr. Karmolinski had submitted the security guard positions to Dr. Kline for his approval, but had not received communication from Dr. Kline as to whether the positions would be approved. Therefore, it can be deduced that Dr. Kline approved the security guard positions sometime between August 11, 1998, and September 9, 1998.

The proposed dates, then, as to availability of the security guard positions are as follows. Mr. Karmolinski testified that the security guard positions were regularly available on and after July 14, 1997. The date of the labor market survey was August 3, 1998. The instant hearing was held on August 11, 1998, and as of that date, Dr. Kline had not approved the security guard positions. Finally, letters were received from Employer’s counsel on September 9, 1998, and September 15, 1998, with additional exhibits containing Dr. Kline’s approval of the security guard jobs.

Mr. Karmolinski’s assertion that the security jobs were regularly available on July 14, 1997, coincides with the date on Employer’s Exhibit 12, Form LS-208, in which Employer advised that temporary total disability payments would cease on July 14, 1997, per the results of the labor market survey. Claimant has submitted no evidence to controvert Employer’s assertion that the security guard positions and similar positions were not available on that date. The labor market survey asserts that the positions in the survey “are considered to be reasonably available” and “currently in and/or frequently available in the labor market.” (EX-11, at (d)). Because Claimant has not refuted Employer’s position as to the availability of suitable alternate employment on that date, I find that the security guard positions were available to the Claimant as of July 14, 1997. This, combined with the Board’s finding of fact, that such jobs constituted

suitable alternate employment, results in a finding that suitable alternate employment existed as of July 14, 1997.

Claimant's argument that the positions were not available to him until the date of the hearing because Employer did not provide the results of the labor market survey to him until that time must be rejected. The courts have consistently held that the employer is not required to become an employment agent for the claimant. *See Palombo v. Director, OWCP*, 937 F.2d 70, 74 (2d Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988).³

Claimant's argument that Dr. Kline's approval was necessary for the positions identified by Mr. Karmolinski to be considered available suitable alternate employment also fails. There is no requirement that the treating physician actually approve the positions in the course of Employer establishing that suitable alternate employment exists, nor that such approval be given for the positions to necessarily be "available" to a claimant. The employer bears the burden of showing suitable alternate employment, and while the employer may certainly submit the approval of the treating physician in attempting to meet its burden of proof, the physician's opinion does not end the analysis as to the availability of the selected positions. It is the duty of the administrative law judge, upon fully examining all of the evidence, not merely the physician's statements, to determine whether the availability of suitable alternate employment has been proven. The analysis as to suitability of alternate employment does not, nor should it, begin and end with the treating physician. *See Ceres Marine Terminals, Inc. v. Knight*, 162 F.3d 1154, 1154 (4th Cir. 1998) (per curiam) (unpublished table decision) (finding that doctor's opinion as to the suitability of alternate employment was not conclusive and administrative law judge could reject such evidence if appropriate). Therefore, while the opinion of the treating physician may well be applicable in determining the suitability of alternate employment, it does not necessarily comport that the date of the physician's opinion determines the date on which such employment was available.

Did Claimant Establish That He Diligently Sought Alternate Employment of the "General Type Shown by Employer to be Suitable and Available"?

Once an employer meets its burden of showing that suitable alternate employment is available to a claimant if that claimant diligently seeks it, the claimant bears a complementary burden and "may still establish disability by showing that he has diligently sought appropriate employment but has been unable to secure it." *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 542 (4th Cir. 1988) (citing *Trans-State Dredging v. Benefits Review Bd.*, 731 F.2d 199, 200 (4th Cir. 1984)); *see also New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1043 (5th Cir. 1981). Further, the claimant need not seek jobs identical to those identified by the employer as suitable alternate employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 74 (2d Cir. 1991). The employment need only be "within the compass of employment opportunities shown by the employer to be reasonably attainable and available." *Trans-State Dredging*, 731 F.2d at 202. However, the jobs that a claimant seeks must be "appropriate" and

³ As discussed below, Claimant did not respond to the letter sent to his (Claimant's) counsel by Mr. Karmolinski requesting a meeting with Claimant. (EX-11, at (b)). Mr. Karmolinski's failure to communicate with Claimant certainly cannot be viewed as more tolerable than Claimant's failure to communicate with Mr. Karmolinski.

consistent with the claimant's physical restrictions. *See Tann*, 841 F.2d at 543-44 (finding that claimant's work as a farmhand was not appropriate work given that claimant was physically restricted from doing extensive lifting, climbing, walking, and standing). The claimant also bears the burden of showing that he is willing to work. *Trans-State Dredging*, 731 F.2d at 201. The likelihood of a finding that the claimant diligently sought employment is reduced where the claimant fails to seek employment for a significant period of time. *Tann*, 841 F.2d at 544.

If a claimant proves that he diligently sought employment, the finding of total disability may be reinstated. *Palombo*, 937 F.2d at 75; *Tann*, 841 F.2d at 542. If a claimant does not meet his burden of proof as to whether he diligently sought employment, the claimant will be considered only partially disabled and will be limited to the recovery that is provided for in the applicable schedule under Section 8 of the Act. 33 U.S.C. § 908(c)(1) (2002); *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 274 (1980); *Glchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 918 (4th Cir. 1998).

Claimant argues in his Brief on Remand that he did, in fact, diligently seek employment but was unsuccessful in securing same. Claimant offered Claimant's Exhibit 1, a list of jobs that he sought, which consists of fourteen places of potential employment where Claimant inquired for employment between April 27, 1998, and July 3, 1998. (CX-1, at 1). The jobs were located throughout the area, including Hampton, Newport News, Norfolk, Portsmouth, and Suffolk, Virginia. (CX-1, at 1). Claimant inquired as to positions at such places as Wal-Mart, Gateway, Midas, Lowe's, and a McDonald's restaurant. (CX-1, at 1). Claimant also testified that he inquired for employment with one additional employer, Kirk Lumber, which was not included on the list, on the Friday preceding the hearing. (Tr. at 24-25). Claimant did not testify as to the types of jobs for which he applied or inquired.

According to the job list, Claimant filled out ten applications. (CX-1, at 1). Claimant stated he was never offered a job by any of the employers he contacted and had not turned down any jobs. (Tr. at 23). Claimant testified that he would have accepted employment with any of the employers, had such been offered to him. (Claim. Br. on Rem., at 7; Tr. at 28). Claimant argues that the number of jobs he sought should not be determinative of whether he diligently sought employment, but rather, the court should look at whether Claimant "genuinely sought work, yet was unable to obtain employment." (Claim. Br. on Rem., at 8).

Claimant further testified at the hearing that he did not seek work in 1997; he stated that he continued to experience pain in his right hand and right arm and felt like he could not do any work. (Tr. at 22). Claimant also stated that he did not seek any work because he was "going . . . back and forth to the doctor's."⁴ (Tr. at 22). Further, Claimant stated that he did not register with the Virginia Employment Commission in attempting to find a job. (Tr. at 37).

Employer counters that Claimant did not diligently seek employment, stressing the fact that Claimant indicated that he began to look for jobs in April, 1998, after Dr. Lee told him that he was not totally disabled and advised him to look for a light-duty job. (Empl. Br. on Rem., at 3; Tr. at 32). Employer further asserts that Claimant was not diligent by emphasizing Claimant's

⁴ Claimant suffered his injury on May 11, 1993. (Tr. at 6). His last date of employment with Employer was August 26, 1996. (Tr. at 12).

statements on cross-examination that he did not apply for any security guard positions when he sought employment. (Empl. Br. on Rem., at 3; Tr. at 37). Employer further argues that Claimant did not demonstrate that he was willing to work. (Empl. Br. on Rem., at 4).

An examination of the exhibits submitted by Employer reveals that, during the latter part of 1996, after Claimant left employment with Employer, he was seen several times by Dr. Kline, including appointments following surgery on his right hand. (EX-2, at (ii)-(pp)). Dr. Kline's notes indicate that Claimant continued to experience pain in his hand following surgery, and that Claimant attended hand therapy. (EX-2, at (jj), (ll)-(nn)). Claimant apparently continued to visit Dr. Kline on a monthly basis during the first five months of 1997. (EX-2, at (qq)-(vv)). Claimant also saw Dr. Kline on October 9, 1997. (EX-2, at (ww)). Claimant testified that he saw Dr. Longford, his family physician, in the latter part of 1997, and saw Dr. Lee three times in early 1998. (Tr. at 29-31).

Over a span of eleven weeks in 1998, Claimant inquired, on average, one to two times per week for employment. However, over the preceding twenty months (from September, 1996, until late April, 1998), Claimant did not seek any jobs. While it is evident from the medical records submitted by Employer that Claimant was in a great deal of pain up to and following the surgery on his hand and also began experiencing pain in his neck following his hand surgery, the records also show that Claimant's overall pain decreased significantly between September, 1996, and May, 1997.⁵ (EX-2, at (ii)-(vv)). However, Claimant did not seek any jobs between May, 1997, and late April, 1998. Claimant offered that he was experiencing pain in his hand and arm as one reason why he did not seek work in 1997, particularly after Employer ended temporary total disability payments. Dr. Kline's records indicate, however, that in early April, 1997, Claimant was "doing pretty well," and on May 12, 1997, Dr. Kline set forth permanent work restrictions for Claimant. (EX-2, at (tt), (vv)).

Claimant also testified that, when he inquired at Kirk Lumber regarding employment, the gentleman with whom he spoke noted that Claimant had been unemployed for a period of time because he was ill; Claimant then corrected the gentleman and told him that he was not ill but in fact had a hand injury. At that point, the gentleman told Claimant, "No, I can't use you." (Tr. at 24-25). There is no testimony by Claimant indicating that he explained to the gentleman at Kirk Lumber that he could use his right hand so long as the tasks were within the established physical restrictions, nor that he was left-handed. (See Tr. at 31 (confirming that he was left-handed)). Finally, there was no indication that Claimant ever followed up with any of the places of employment where he visited and filled out applications. Therefore, for these reasons, I find that Claimant has not demonstrated reasonable diligence in seeking alternate employment.

Claimant has also not, in my opinion, demonstrated a willingness to work. Although Claimant expressed his willingness to take any job that was offered to him, it is also significant that Claimant did not initially seek work on his volition, but rather, only after Dr. Lee advised that he was not totally disabled and should seek some light-duty job. Further, Claimant did not meet with Employer's vocational consultant, despite the fact that Mr. Karmolinski sent a letter to Claimant's counsel requesting such a meeting. (EX-11, at (b)). The Board has previously held

⁵ There was no testimony confirming and no assertion made by Claimant that his neck pain had been medically linked to the problems Claimant experienced with his hand. (Tr. at 43-44).

that injured claimants must cooperate with vocational consultants, and failure to do so may contribute to a finding of lack of willingness to work. *Villasenor v. Marine Maint. Indus., Inc.*, 17 BRBS 99, 102 (1985). Further, while it is not required that an injured claimant exhaust all avenues in seeking employment, Claimant did not register with the Virginia Employment Commission, yet another indication that Claimant did not exercise reasonable diligence or that Claimant has a genuine desire and a willingness to work.

Additionally, even if Claimant had demonstrated willingness to work and reasonable diligence in seeking employment, a question remains as to the appropriateness of the work that he sought. While it is certainly feasible that the places of employment where Claimant applied for work have positions in which Claimant could have served given his physical restrictions, no evidence was offered by Claimant as to the specific positions for which he applied. Claimant's only statement to this issue was that none of the positions for which he applied were cashier or security guard positions. (Tr. at 37).

Claimant has not demonstrated that he was reasonably diligent in seeking alternate employment. Claimant has further failed to establish that he was willing to work or that the jobs he sought were appropriate given his physical restrictions. Because Claimant has failed to sustain his burden of proof as to his diligence in seeking alternate employment, Claimant is considered only partially disabled, and his recovery for partial disability will be limited to that which is provided for in the applicable schedule under Section 8 of the Act. 33 U.S.C. §908(c) (2002).

Finding of Disability

The Board directed, in its Second Remand:

If claimant established he diligently sought employment, the administrative law judge may reinstate his total disability finding. In any event, claimant is entitled to total disability benefits until the date suitable alternate employment became available. If claimant is only partially disabled, his recovery is limited to that provided by the applicable schedule.

Brown v. Newport News Shipbuilding & Dry Dock Co., Case No. 1997-LHC 2495, BRB No. 01-0905, BRB Dec. & Order of Rem., Aug. 22, 2002, at 4 (per curiam) (citing 33 U.S.C. § 908(c) (2002); *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 274 (1980); *Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 918 (4th Cir. 1998)). Because I find that Claimant was not diligent in seeking alternate employment, I further find, in accordance with the Board's Second Remand, that Claimant is partially disabled, which thereby entitles him to receive disability payments in accordance with Section 8 of the Act.

It is undisputed that Claimant reached maximum medical improvement on May 12, 1997. (ALJ Dec. on Rem., Aug. 8, 2001, at 2). Suitable alternate employment has been established as of July 14, 1997, which becomes the critical juncture at which Claimant's total disability became partial disability. Therefore, Claimant is entitled to total disability benefits until July 14, 1997, the date of availability of suitable alternate employment. The parties previously stipulated, as set

forth above, that Claimant's average weekly wage at the time of his injury was \$548.95, which results in a compensation rate of \$365.97 per week.

Further, Claimant is entitled to recover benefits for permanent partial disability in accordance with Section 8 of the Act. As set forth in *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268 (1980) [hereinafter *PEPCO*], compensation for permanent partial disability is determined in one of two ways. First, if the injury is specifically identified in Section 8 under subsections (c)(1) through (c)(20), an injured employee will receive 66 2/3 of his average weekly wages for the number of weeks specified in the statute. If the injury is not of the nature scheduled in Section 8, the injured employee is entitled to receive 66 2/3 of the difference between his average weekly wage and his post-injury wage-earning capacity. See *PEPCO*, 449 U.S. at 270; *Gilchrist*, 135 F.3d at 918. Section 8 further provides that "[c]ompensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member." 33 U.S.C. § 908(c)(19) (2002). The Board has consistently held that the proper formula when determining compensation for partial loss or loss of use is to apply the percentage of loss to the number of weeks for which a claimant would be entitled to compensation had the entire body part been lost. *Nash v. Strachan Shipping Co.*, 15 BRBS 386, 391 (1983).

Claimant in this matter was diagnosed with carpal tunnel syndrome in both wrists. After surgery on his right hand to correct the problem, Claimant was placed upon permanent physical restrictions.⁶ (ALJ Dec. & Order, Nov. 10, 1999, at 3-4; Tr. at 15). Claimant was unable to return to his work as a pipefitter with Employer. (ALJ Dec. & Order, at 4). Claimant's physical difficulties include his inability to grip small items with his right hand; the inability to reach above shoulder level with his right arm; and pain in his right shoulder and elbow. (EX-6, at (a)). The physical restrictions placed upon Claimant by Dr. Kline include: "occasional lifting of ten pounds"; "negligible frequent or constant lifting"; avoidance of "activities requiring speed or manual dexterity"; avoidance of "work requiring competitive manipulations of small items in his right hand." (EX-2, at (vv)).

Dr. Lee provided Claimant with similar physical restrictions, finding that Claimant was capable of light duty work, so long as Claimant adhered to certain restrictions, including: avoidance of "significant reaching and lifting above shoulder level with his right arm"; "occasionally lift, carry, and push/pull at levels below the shoulder (twenty-five pounds occasionally, ten pounds frequently)"; no repetitious use of his hands or arms, including no sustained gripping; no use of vibrating tools; and no engaging in "fine motor skills with his right hand." (EX-6, at (c)).

Claimant seeks a disability rating of forty-six percent (46%) to Claimant's upper right extremity, as assigned by Dr. Lee. (ALJ Dec. & Order., at 3; EX-6, at (e)). Claimant argues that the disability rating assigned by Dr. Lee is the appropriate rating to use because that rating accounts for Claimant's "decreased sensation and severe pain in his upper right extremity which may both prevent activity and cause outcries." (Claim. Br. on Rem., at 10-11). Claimant argues that Dr. Kline's rating did not take these factors into account and instead relied solely upon Claimant's range of motion; therefore, Dr. Kline's rating should not be used to determine

⁶ According to Employer's Exhibit 1, Claimant was previously compensated for a seven percent permanent partial disability rating to his left upper extremity. (EX-1, at (s)).

Claimant's permanent partial disability rate. (Claim. Br. on Rem., at 11). Claimant further asserts that Dr. Lee's rating is more accurate and appropriate because it was assigned more recently than Dr. Kline's rating and is therefore a more accurate portrayal of Claimant's disability. Dr. Lee assigned the rating of forty-six percent on May 20, 1998, while Dr. Kline's rating was assigned over seven months prior, on October 9, 1997. (Claim. Br. on Rem., at 11; EX-2, at (ww); EX-6, at (e)).

Dr. Lee arrived at a forty-six percent disability rating by utilizing the American Medical Association Guides to the Evaluation of Permanent Impairment [hereinafter AMA Guide]. (EX-6, at (e)). Dr. Lee first "grad[ed] the sensory deficits of the involved nerves in [Claimant's] upper extremity," and using the table of combined values, rated his impairment at fifty-one percent. (EX-6, at (e)). Dr. Lee also noted that Claimant's decreased sensation and severe pain in his upper right extremity "may cause outcries as well as prevent activity (major causalgia)." (EX-6, at (e)). Claimant's impairment rating due to decreased sensation and severe pain, according to the AMA Guide is ninety-percent, as stated by Dr. Lee. (EX-6, at (e)). Dr. Lee then combined these values to arrive at a disability rating for Claimant's upper right extremity of forty-six percent. (EX-6, at (e)).

Employer, on the other hand, asserts that the proper disability rating is nineteen percent (19%) as to the upper right extremity, as assigned by Dr. Kline. (ALJ Dec. & Order., at 3; Tr. at 16-17; EX-2, at (ww)). Dr. Kline's notes indicate that he based Claimant's impairment rating on Claimant's range of motion test as provided by the rehabilitation clinic that Claimant was sent to by Dr. Kline; Dr. Kline also discussed Claimant's condition with the rehabilitation nurse. (EX-2, at (ww)). Dr. Kline's disability rating was based upon Claimant's loss of motion of his fingers, wrist, and elbow, and Dr. Kline felt that a nineteen-percent rating "compensates [Claimant] well for grip loss." (EX-2, at (ww)). Dr. Kline asserts that he utilized the fourth edition of the AMA Guide. (EX-2, at (ww)). Dr. Kline stated in his notes that Claimant was "not entitled to a neurologic impairment since his nerve conduction studies are [within normal limits]." EX-2, at (ww)). Employer voluntarily compensated Claimant at the rate of nineteen percent, after Employer ceased paying temporary total disability compensation, for a period of 59.28 weeks.⁷ (Tr. at 7-8; EX-13, at 1).

When balancing medical ratings, the Board has consistently found that the ALJ is not required to adhere to the AMA Guide or any other particular formula in determining disability ratings; rather, the end result must be reasonably supported by the available medical records. *Griffin v. Gates & Fox Constr. Co.*, 13 BRBS 384, 386-87 (1981); *Mazze v. Frank J. Holleran, Inc.*, 9 BRBS 1053, 1055 (1978). Further, an administrative law judge "may consider a variety of medical opinions and observations in addition to claimant's description of symptoms and physical effects of his injury in assessing the extent of claimant's disability." *Pimpinella v. Universal Mar. Serv., Inc.*, 27 BRBS 154, 159-60 (1993) (citing *Bachich v. Seatrain Terminals of California, Inc.*, 9 BRBS 184 (1978)).

⁷ Though not specifically outlined by the parties, Section 8(c)(1) of the Act provides for compensation for the loss of an arm for 312 weeks. 33 U.S.C. § 908(c)(1) (2002). Applying the nineteen percent disability rating results in compensation for a period of 59.28 weeks.

In the instant case, the ratings assessed by Drs. Lee and Kline vary by twenty-seven percent, certainly not a negligible amount. It is to be noted that Dr. Kline treated Claimant from the time of his original injury in 1993 until October, 1997, affording Dr. Kline the opportunity to observe Claimant over an extended period of time. Dr. Kline also performed surgery on Claimant. Meanwhile, Dr. Lee treated Claimant in early 1998, after his surgery and after a significant period of rehabilitation. (EX-6, at (a)).

In examining Employer's exhibits, it is interesting to note that the impairment rating provided by Hand Rehabilitation of Hampton Roads [hereinafter Hand Rehabilitation], Employer's Exhibit 10, contains similar assignment of percentages to the specific areas of Claimant's upper right extremity as those noted by Dr. Kline. (*Compare* EX-2, at (ww), with EX-10, at (k)-(l)). However, the impairment rating provided by Hand Rehabilitation notes a total rating of thirty-nine percent (39%), which includes the impairment of Claimant's upper right extremity and impairment of Claimant's peripheral nerve system. (EX-10, at (l)). Hand Rehabilitation also provided a separate rating as to Claimant's right hand, rating Claimant's right hand at eleven percent (11%) impaired. (EX-2, at (q)). Hand Rehabilitation additionally noted that Claimant "reported numbness in all digits of the right hand" and that tests on his right arm "indicat[ed] diminished protective sensation." EX-10, at (d)). Similarly, Dr. Lee, in his evaluation of Claimant, noted "associated numbness and tingling" and that Claimant's "right hand consistently 'falls asleep.'" (EX-6, at (a)). These assessments correlate with Claimant's testimony that he continued to experience problems with his hand in 1997. (Tr. at 22).

Clearly, there is less difference in the totality of Hand Rehabilitation's rating and the rating assigned by Dr. Lee (39% vs. 46%), as opposed to the difference between Dr. Kline's and Dr. Lee's assessments (19% vs. 46%), even though Dr. Kline and Dr. Lee had earlier placed Claimant under similar physical restrictions. When presented with Dr. Lee's findings and rating of Claimant's disability, Dr. Kline did not change his opinion of Claimant's disability rating. (EX-2, at (xx)).

Dr. Lee's permanent partial disability rating is the proper rating to assign to Claimant. First, Dr. Lee's assessment of Claimant's right upper extremity occurred after surgery was performed on his right hand and Claimant underwent rehabilitation. (EX-6, at (a)) (noting Claimant's rehabilitation period). This allowed Dr. Lee to see the final outcome of Claimant's condition after a significant period of time had elapsed. Dr. Lee's rating examines the totality of factors affecting Claimant at the time the rating was determined, including but not limited to Claimant's range of motion, decreased sensation, and the effects that these two conditions could have on his ability to perform tasks and functions. Dr. Lee's evaluation of Claimant's condition is more similar to Hand Rehabilitation's than to Dr. Kline's; while Dr. Kline adopted a portion of Hand Rehabilitation's evaluation, he refused to adopt the remainder with respect to numbness Claimant was experiencing. The Board has previously held that, when determining benefits, it is proper to consider sensory loss and weakness as medical factors in determining loss of use compensable under the Act, so long as the resulting impairment rating was not amplified to compensate the injured employee for pain and suffering. *Pimpinella v. Universal Mar. Serv., Inc.*, 27 BRBS 154, 159 (1993). Dr. Lee took such factors as Claimant's sensory loss into account, resulting in a more accurate and credible determination of Claimant's permanent partial disability rating.

Reviewing all the evidence and testimony indicates that Claimant was experiencing the conditions highlighted by Dr. Lee and that adopting the forty-six percent rating would not compensate Claimant for pain and suffering; instead, these conditions affect his day-to-day activities and his ability to perform work-related tasks with his right upper extremity. Therefore, I find that the proper rating for Claimant's permanent partial disability is forty-six percent (46%). This percentage takes into account the medical evidence provided, as well as Claimant's testimony as to the activities he is precluded from doing due to the pain and his physical restrictions.

Section 8(c)(1) of the Act provides for compensation for the loss of an arm for 312 weeks. As outlined above, compensation for the loss of use or partial loss of use of a body part is compensated by applying the percentage of loss to the number of weeks an injured claimant would have been entitled to compensation had he lost the entire body part. Applying the forty-six percent disability rating to the appropriate number of weeks under the schedule results in a compensation period of 143.52 weeks (312 weeks X 46% = 143.52 weeks).

ORDER

Accordingly, it is hereby ordered that:

1. Employer, Newport News Shipbuilding & Dry Dock Company, is hereby ordered to pay to Claimant, James W. Brown, total disability from May 12, 1997, to July 14, 1997, at a compensation rate of \$365.97 per week;
2. Employer is further ordered to pay Claimant permanent partial disability commencing July 14, 1997, for a period of 143.52 weeks, at a compensation rate of \$365.97 per week;
3. Employer is hereby ordered to pay all medical expenses related to Claimant's work related injuries;
4. Employer shall receive credit for all compensation already paid;
5. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits and penalties, computed from the date each payment was originally due to be paid. *See Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984).

6. Claimant's attorney, within twenty (20) days of receipt of this order, shall submit a fully documented fee application, a copy of which shall be sent to opposing counsel, who shall then have ten (10) days to respond with objections thereto.

A

RICHARD E. HUDDLESTON
Administrative Law Judge